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power of the first taker to prevent happening, is void. In *Jackson* v. *Robins* (1819) 16 Johns. 537, he is more explicit: he recognizes that every such devise is to some extent dependent upon the will of the first taker, e. g., where the contingency is marriage, but distinguishes these cases as lying without the purview of his rule; it is the power to dispose of the property so as to free it from the burden of the devise over, and thus defeat that devise, which renders the latter void. This reason for his rule, like that in *Ide* v. *Ide, supra,* would logically destroy a remainder after a life estate with power of disposal, as well as an executory devise where the contingency is not the spending itself. In each alike, the power is destructive of the substance of the gift over. Chancellor Kent does not distinguish between tangible property and rights in property. See Digby, Real Prop. 304, n. 2. The sale destroys the former but not the latter. Otherwise a life tenant by exercising a power of sale, could defeat a vested remainder. [The power of disposal does not render the remainder contingent. *Burleigh* v. *Clough* (1872) 52 N. H. 267.] Not only is Chancellor Kent's reason unsound, but the rule itself. This latter fact Prof. Gray has clearly pointed out. Restraints on Alienation (2nd Ed.) § 69. An executory devise is, indeed, indestructible by the first taker. 2 Fearne, Cont. Rem. 51. That is, he cannot prevent the executory devise from vesting if the contingent event ever happens. But that does not mean that the contingent event itself may not be within his power.

In New York the Real Property Statutes recognize the existence of expectant estates which may be defeated by any act or means that the party creating them shall have authorized. 3 N. Y. R. S. 217 §§ 32, 33. *Greyston* v. *Clark* (1886) 41 Hun 125 and *Leggett* v. *Firth* (1889) 53 Hun 152 regarded these sections as validating executory devises of the kind above discussed, for the statute clearly applied. In the latter case on appeal, (1892) 132 N. Y. 7, the Court of Appeals said that the devise over was not void, even though defeasible by the first taker. It construed the first beneficiary's estate to be only a life interest upon the authority of *Terry* v. *Wiggins* (1872) 47 N. Y. 512. The latter case adopted the same construction, apparently on the ground that an executory devise would be void as repugnant. A strong dictum of the Court of Appeals in *Leggett* v. *Firth, supra,* repudiated this last result but ignored *Terry* v. *Wiggins* on this point. The latter case would seem to nullify the provision of the statute that expectant estates shall not be void because thus liable to be defeated. If correct, the statutes have left the old rule intact. The last decision is *Kelley* v. *Hogan* (1902) 71 App. Div. 343, where the first taker could dispose of the property not only by deed but also by will. It was held that in the face of such an absolute power of disposition the statute could not save the devise over. Such a distinction has no basis in the statute, and leaves the law in New York uncertain.

PROPERTY OF A NON-RESIDENT DECEDENT UNDER THE NEW YORK TRANSFER TAX ACT.—Legislatures in taxing the privilege of acquisition by will or inheritance, see 7 COLUMBIA LAW REVIEW 293, commonly include transfers from a non-resident decedent, of property within the State. Cf. N. Y.

Laws 1896, c. 908, § 220, 1; see *State* v. *Dalrymple* (1889) 70 Md. 294. Although such statutes are generally regarded as imposing a tax not on the estate but on the succession, *Matter of Swift* (1893) 137 N. Y. 77; *Matter of Merriam* (1894) 141 N. Y. 479; *Matter of Wolfe* (1903) 89 App. Div. 349; aff'd (1904) 179 N. Y. 599, it has been said that the assessment as to a non-resident's personalty cannot be on the succession; *Matter of Bishop* (1903) 82 App. Div. 115, since personalty passes by the law of the domicile. But as foreign law operates only by consent of the sovereign in whose territory the property has its actual situs, Story, Confl. of Laws, §§ 18, 550, the local transfer tax is really a condition precedent to the succession under the *lex domicilii*. That double taxation may result is no controlling objection. *Blackstone* v. *Miller* (1902) 188 U. S. 189; see *Greeves* v. *Shaw* (1899) 173 Mass. 205.

The earliest Transfer Tax Act in New York, Laws 1885, c. 483, was construed, by a divided Court, not to cover the personalty of a non-resident. *Matter of Enston* (1889) 113 N. Y. 174. The defect was cured by a change of phrase, Laws 1887, c. 713, § 1; *Matter of Romaine* (1891) 127 N. Y. 80, but it later appeared that adequate procedure had not been provided. *Matter of Embury* (1897) 19 App. Div. 214; aff'd (1897) 154 N. Y. 746. A line of decisions under the statute as next materially amended, however, at once established an aggressive interpretation. Thus, on the ground of the protection accorded either directly or to the ultimate assets represented, cf. *Callahan* v. *Woodbridge* (1898) 171 Mass. 595, 597, "property within the state" was construed to embrace certificates of stock of domestic corporations, though kept by the non-resident decedent at his domicile, *Matter of Bronson* (1896) 150 N. Y. 1; bonds both of foreign, *Matter of Morgan* (1896) 150 N. Y. 35, and of domestic corporations, if deposited in New York, *Matter of Whiting* (1896) 150 N. Y. 27, and a New York bank account. *Matter of Houdayer* (1896) 150 N. Y. 37. And the steady course of enactment and of interpretation has ever since been towards enlarging the scope of the statute. *Matter of Gordon* (1906) 186 N. Y. 471, 483. Contrast *Matter of Phipps* (1894) 77 Hun 325; aff'd (1894) 143 N. Y. 641, and *Matter of Clinch* (1905) 180 N. Y. 300, 302. Cf. *Matter of Daly* (1905) 100 App. Div. 373, aff'd (1905) 182 N. Y. 524.

This tendency is well illustrated by a recent Court of Appeals decision. *Matter of Ramsdill* (1908) 190 N. Y. 492. A resident of Massachusetts, dying intestate, left personalty both there and in New York. One group of distributees fell within the exemptions of the New York statute. 3 R. S. Tax Law, § 221. It was unanimously held that the Massachusetts administrator could not deprive the State of its *pro rata* tax on the succession of the non-exempt distributees, by paying them out of Massachusetts assets and applying the New York property wholly towards the satisfaction of the shares of the exempts. The theory was that the status both of the distributees and of the State under the Transfer Tax Act became fixed instantly at the intestate's death. See *Matter of Westurn* (1897) 152 N. Y. 93, 102. The various views to the effect that an intestate's personal estate is until the grant of administration in abeyance, *Brown* v. *Bibb* (Tenn. 1865) 2 Coldw. 434, 437; *McNearman* v. *Maxfield* (1882) 38 Ark. 631, 636,

or for certain purposes in the administrator by relation back, Com. Dig. Tit. Adm. B. 10; *Babcock* v. *Booth* (N. Y. 1842) 2 Hill 181; 1 Williams, Ex'rs. (7th Am. Ed.) 760, or in the custody of the law, *Bartlett* v. *Hyde* (1834) 3 Mo. 490, or more specifically, in the Probate judge, 21 & 22 Vict. c. 95, § 19, concern the immediate legal title, and under modern law at least, in no respect the beneficial interest. The ownership of the administrator is of course purely temporary and special. *Ledyard* v. *Bull* (1890) 119 N. Y. 62, 72; Schouler, Ex'rs & Adm'rs, § 242; Pom. Eq. Jur. § 1088. His legal title will not necessarily be enforced against the distributees, standing on their equitable rights, when there are no debts. *Richardson* v. *Cole* (1900) 160 Mo. 372. Friendly settlements without administration have been often upheld. *Babbitt* v. *Bowen* (1859) 32 Vt. 437; *Matter of Losee* (1907) 119 App. Div. 107. Some courts have even recognized a direct legal title in the distributees, loosely describing them as tenants in common. *Hyde* v. *Stone* (1831) 7 Wend. 354, 357; *Harrington* v. *Lowman* (1897) 22 App. Div. 266. A distributee's interest pending administration is subject to "trustee process," *Wheeler* v. *Wheeler* (Mass. 1838) 20 Pick. 563, and if he dies before distribution his share goes to his representatives. *Moore* v. *Gordon* (1867) 24 Ia. 158. Distribution merely ascertains rights which have already vested. *Kingsbury* v. *Scovill* (1857) 26 Conn. 349; *Perryman* v. *Greer* (1863) 39 Ala. 133. Although these rights do not attach to any specific property, cf. *Pritchard* v. *Norwood* (1892) 155 Mass. 539, a distributee takes a beneficial interest in the whole mass of personalty; that liquidation is the common practice does not mean that his interest is merely a claim for a sum of money. *Cooper* v. *Cooper* (1874) L. R. 7 Eng. & Ir. App. Cas. 53; cf. *Brown* v. *Bibb, supra.* It follows that in the principal case, at once upon the intestate's death, each distributee, exempt and non-exempt alike, took a *pro rata* interest in the New York personalty. Since the State's right to the transfer tax attached at the same instant, beyond the power even of the legislature to divest, *In re Lander's Estate* (Cal. 1907) 93 Pac. 202, the administrator's later apportionment could not affect the statutory liability.

The administrator's contention in the principal case had been granted below, without opinion, on the authority of *Matter of James* (1894) 144 N. Y. 6, where the executor was allowed to avoid the New York tax on a non-exempt legatee by similarly marshalling assets. The Appellate Division was unanimously reversed, on the ground of the "obvious distinction between testacy and intestacy." What that distinction may be does not appear. That the executor's title passes at once by the will and the administrator takes only by virtue of his later appointment, is immaterial. *Touchst.*, 474. The title of the former is as purely administrative as the latter's. *Lane* v. *Albertson* (1903) 78 App. Div. 607, 619. In general there is no difference between their rights, duties and powers. 1 Williams, *supra*, 775; *Shoenberger's Ex'rs.* v. *Savings Inst'n* (1857) 28 Pa. St. 459. 466; Redf., Surr. Pr. (6th Ed.) 515. Such differences as may exist, see 6 COLUMBIA LAW REVIEW 15, concern their dealings with third parties, not the beneficiaries. See Minor, Confl. of Laws, § 116. And a general legatee, like a distributee, simply takes a *pro rata* share in the whole residual per-

sonal estate. Cf. *Kingsbury* v. *Chapin* (Mass. 1907) 82 N. E. 700, 702. That the State's right to the tax is fixed at the instant of death, as argued in the principal case, has been repeatedly held also where decedent was testate. Assessment may be made before probate. *People* v. *Barker* (1896) 150 N. Y. 52. The assignment of a residuary legacy to an exempt legatee before administration cannot change its taxability. *Matter of Cook* (1907) 187 N. Y. 253. Where a legatee died within three days of the testator, his share was notwithstanding subject to the tax. *Matter of Borup* (1899) 28 Misc. 474. The value at the testator's death, not that at the time of transfer of actual possession, controls the appraisal of a bequest. *Matter of Davis* (1896) 149 N. Y. 539; *Matter of Sloane* (1897) 154 N. Y. 109.

This discrepancy of result may best be explained by the advance in the Court's attitude towards the scope of the statute with respect to non-residents, since the date of *Matter of James, supra,* and in failing frankly to overrule that case the Court of Appeals, it is submitted, has observed a distinction between testacy and intestacy which seems unfounded in logic or justice. That no such distinction exists appears even to have been urged in an earlier decision under the statute by one of the judges concurring in the principal case. *Matter of Romaine, supra,* 85. Later adjudications may be expected to refine the present apparent difference. Such a disposition is indicated by the terms in which *Matter of James, supra,* is in the principal case expressly affirmed. Though the reported facts give no clear warrant for such interpretation, *Matter of James* is described as holding that the tax may be avoided where a *specific* legatee of a foreign testator can obtain satisfaction of his legacy in a foreign jurisdiction. Clearly, to exact through the executor a tax on a specific legacy of designated foreign property merely because unrelated portions of the same estate lie within the taxing State, would be in effect an exercise of sovereignty beyond the jurisdiction. A distinction between intestacy and testacy broadly, is unsound; but the application of the doctrine expressed in *Matter of James, supra,* to cases of specific legacies of foreign property is both logical and just. Such limitation will bring consistency, both in legal principle and in practical administration, into the inheritance tax law of New York.

NATURE OF PRESCRIPTIVE RIGHTS AS DETERMINED BY USER.—The rule that a prescriptive right is measured by the user in which it originated, Washburn, Easements (4th Ed.) 135, cannot be rigidly applied; *Cowling* v. *Higginson* (1838) 4 M. & W. 245; it considers the use as an entity, whereas, "user" is a composite, containing different elements. Manner of using is one of these; purpose, is another. It is necessary to determine how far each of these is a substantial element of the right, for only those which are essential elements are limitations upon the right, and the right (i. e. user) is variable as to the others. For example, the acts done by virtue of, or in acquiring the right, may vary to some extent within limits comprised within the general term "manner"; it is the "manner" which must remain identical. Another question is whether the right may not be measured by the manner alone or the purpose alone, and so be varied as to the absent element. To ascertain the scope of the right in each case, it